STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM TOPPING,

UNPUBLISHED July 1, 2003

Plaintiff-Appellant,

V

No. 225514 Mecosta Circuit Court LC No. 96-011877-NO

FERRIS STATE UNIVERSITY, SUSAN HAMMERSMITH, and JOHN THORP,

Defendants-Appellees.

WILLIAM TOPPING,

Plaintiff-Appellant,

V

No. 242331 Mecosta Circuit Court LC No. 96-011877-NO

FERRIS STATE UNIVERSITY, SUE HAMMERSMITH, and JOHN THORP,

Defendants-Appellees.

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff appeals the trial court's order that granted defendants' motion for summary disposition under MCR 2.116(C)(7), (8) and (10). Plaintiff also appeals the trial court's award of attorney fees and costs against plaintiff and his attorneys as sanctions for frivolous litigation. We affirm.

¹ Plaintiff challenges the summary disposition ruling in Docket No. 225514 and he challenges the award of attorney fees in Docket No. 242331. This Court consolidated the cases on August 2, 2002.

² The trial court awarded the attorney fees and costs pursuant to MCL 600.2591, MCR 2.114 and the inherent authority doctrine.

I. Facts and Procedural History

On December 13, 1996, plaintiff filed this action against Ferris State University, and two of its employees, Sue Hammersmith, the Dean of the College of Arts and Sciences, and John Thorp, the head of the Social Science Department. Plaintiff began teaching for Ferris State in 1988 on a full-time, temporary basis. In his complaint, plaintiff asserted that he worked at Ferris State for other periods of time, including, most recently, in a part-time position from 1995 through August 1996. Plaintiff further alleged that Thorp and Hammersmith refused to hire him on a full-time basis, conspired to deprive him of his rights, and discriminated against him under the Michigan Civil Rights Act (CRA), MCL 37.2101, et seq. Plaintiff also claimed that, beginning in 1989, Ferris State engaged in a pattern of employment discrimination against white males.

In May 1997, plaintiff filed a first amended complaint, which again contained allegations of employment discrimination against defendants, with additional counts labeled "disparate treatment" and "disparate impact." For each of the disparate treatment counts, plaintiff alleged, inter alia, that defendants discriminated against him by refusing to create a tenure-track position for him because of an impermissible characteristic, his color, gender, and race. For each of the disparate impact counts, plaintiff alleged that an affirmative action policy adopted by Ferris State in 1989 had a disparate impact on "whites," "males," and "Caucasians," including plaintiff.

In June 1997, defendants filed a motion for summary disposition on the first amended complaint under MCR 2.116(C)(7), (8) and (10). In September 1998, before he decided the motion, Judge Lawrence Root entered an order that permitted plaintiff to file a second amended complaint to add a retaliation claim. Nothing in the record shows that plaintiff ever filed the second amended complaint. In February 1999, Judge Root orally granted defendants' motion for summary disposition on plaintiff's first amended complaint under MCR 2.116(C)(8). Before he entered the order, however, Judge Root disqualified himself because he conceded he could no longer impartially decide the case. In July 1999, plaintiff filed a motion before the successor judge, Judge Charles Miel, for leave to file a "fourth" amended complaint to cure deficiencies Judge Root identified in the first amended complaint.³

After this Court denied defendants' complaint for a writ of superintending control, which sought to compel Judge Root to enter an order granting defendants summary disposition under MCR 2.116(C)(8), Judge Miel granted defendants' renewed motion for summary disposition under MCR 2.116(C)(7), (8) and (10). Judge Miel also denied plaintiff's motion for leave to file a fourth amended complaint. Following additional post-judgment proceedings, the trial court found plaintiff and his attorneys, James Fett, Marla Linderman, and the law firm of Fett & Linderman, P.C., jointly and severally liable for attorney fees and costs of \$181,003 as a sanction for frivolous litigation under MCL 600.2591, MCR 2.114(D), and under the inherent authority of the court.

II. Summary Disposition

³ There is no indication in the record before us that a "third" amended complaint was ever filed.

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Plaintiff appeals Judge Miel's grant of summary disposition to defendants on plaintiff's first amended complaint. We review a decision granting summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

As an initial matter, plaintiff has insufficiently briefed his arguments regarding individual defendants Hammersmith and Thorp. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Furthermore, we hold that Judge Miel correctly granted summary disposition to Ferris State because plaintiff failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint from the pleadings alone. *Maiden, supra* at 119-120.

In analyzing a claim under MCL 37.2202,⁴ we must determine whether the adverse employment action was "because of" a prohibited characteristic of "religion, race, color, national origin, age, sex" *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997). Though the prohibited characteristic need not be the main or only reason for the adverse employment action, it must be one of the reasons that made a difference in the adverse action. *Id.* In his first amended complaint, plaintiff attempted to state claims of both "disparate treatment" and "disparate impact" discrimination. As this Court set forth in *Duranceau v Alpena Power Co*, 250 Mich App 179, 182; 646 NW2d 872 (2001):

Disparate treatment requires a showing of either intentional discrimination against protected employees or against an individual plaintiff. Disparate impact requires a showing that an otherwise facially-neutral employment policy has a discriminatory effect on members of a protected class. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177, n 26; 579 NW2d 906 (1998).

Under the disparate treatment theory, a plaintiff must show that a prohibited characteristic was "a determining factor in the allegedly discriminatory decision." *Duranceau, supra* at 182.

We agree with plaintiff that, under the CRA, it is unnecessary for a complaint to plead a specific evidentiary standard. We find the reasoning of the United States Supreme Court in *Swierkiewicz v Sorema NA*, 534 US 506; 122 S Ct 992; 152 L Ed 2d 1 (2002), persuasive on this point, because the rules governing pleadings in Michigan do not have heightened pleading requirements for discrimination claims. MCR 2.113. A complaint must merely be specific

- (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
- (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or martial status. [MCL 37.2202.]

⁴ (1) An employer shall not do any of the following:

enough to reasonably inform the adverse party of the nature of the claims against him. MCR 2.111(B)(1); Weymers v Khera, 454 Mich 639, 654; 563 NW2d 647 (1997).

In deciding a motion under MCR 2.116(C)(8), we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmovant. *Maiden, supra* at 119. However, a "mere statement of a pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *Kramer v Dearborn Heights*, 197 Mich App 723, 725; 496 NW2d 301 (1993).

In a discrimination claim under the CRA, a plaintiff must suffer an adverse employment action regardless of the method of proof employed to establish a claim. *Wilcoxon, supra* at 362. The CRA authorizes civil actions for appropriate injunctive relief or damages, meaning "injury or loss caused by each violation of this act." MCL 37.2801. Here, the dispositive question is whether plaintiff sufficiently pleaded an adverse employment action against him by Ferris State that falls within the CRA, with factual allegations specific enough to reasonably inform Ferris State of the nature of the discrimination claim. *Weymers, supra* at 654.

In this regard, we note that, while we are not bound by plaintiff's choice of labels for a cause of action, *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989), plaintiff did, in fact, attempt to state claims based on the "disparate treatment" and "disparate impact" methods of proof in his first amended complaint. Because plaintiff does not discuss on appeal the "disparate impact" counts, however, we need not address them. *Eldred*, *supra* at 150. In any event, regardless of how we view plaintiff's allegations in the first amended compliant, they are insufficient to state a claim under the CRA because plaintiff failed to sufficiently plead an adverse employment action against him that was attributable to a prohibited characteristic.

We find no basis for plaintiff's argument that he sufficiently pleaded that he was denied a "position" because of his "race," "gender," or "color." Looking to federal precedent interpreting the federal Civil Rights Act for guidance in applying the CRA, Chambers v Trettco, Inc, 463 Mich 297, 313; 614 NW2d 910 (2000); Meagher, supra at 710, we agree that there are circumstances in which a plaintiff can pursue a discrimination claim under CRA without formal employment action. See Dews v A B Dick Co, 231 F3d 1016 (CA 6, 2000). In this case, however, plaintiff's first amended complaint alleges that Hammersmith authorized a full-time tenure-track anthropology position in 1990, that Thorp informed plaintiff that this position had to be filled by a "black female," and that the position was not filled. The first amended complaint also alleges that plaintiff wanted a tenure-track position and that he was not offered an anthropology position. However, the complaint does not allege that plaintiff communicated any interest in the 1990 position to Thorp, or otherwise gave notice to or reason for Ferris State, through its agents, to consider him for the alleged position. Because these factual allegations, viewed in a light most favorable to plaintiff, do not disclose a reason or duty to consider plaintiff for the alleged 1990 position, we hold that the first amended complaint fails to state a claim arising from the 1990 position.

Furthermore, if the first amended complaint sufficiently stated a discrimination claim arising from the alleged 1990 position, then Judge Miel correctly granted summary disposition

under MCR 2.116(C)(7), based on the statute of limitations.⁵ The limitation period for plaintiff's discrimination claim is "three years after the time of . . . injury." MCL 600.5805(9); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1991). It is clear from plaintiff's complaint that his claim of an adverse employment action arising from the alleged 1990 position accrued more than three years before the filing of plaintiff's original complaint on December 13, 1996.

Further, the continuing violation doctrine recognized in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 536 n 9; 398 NW2d 368 (1986), does not apply because plaintiff was not a continuous employee of Ferris State. Plaintiff did not work at Ferris State between the summer of 1993 and 1995,⁶ when Ferris State rehired plaintiff for a part-time temporary position. The continuing violation doctrine allows consideration of untimely claims that are connected to a timely, actionable event. *Sumner, supra* at 510. The doctrine does not apply where, as here, plaintiff knew about an allegedly discriminatory action, his employment ceased, and he failed to bring suit within the three-year limitation period. See *Williams v Owens-Illinois, Inc*, 665 F2d 918, 924, modified 28 FEP 1820 (CA 9, 1982).

For the reasons stated, we hold that Judge Miel correctly granted summary disposition for plaintiff's claims regarding the alleged 1990 position. Turning to the question whether the first amended complaint sufficiently pleads any other actionable adverse employment action under the CRA, we hold that it does not.

The general allegations in plaintiff's first amended complaint about Ferris State's discriminatory practices and policies are not sufficient to state a claim because it does not allege that the policy injured plaintiff. See *Sumner*, *supra* at 536; *Wilcoxon*, *supra*. Further, plaintiff's reliance on the hiring moratorium rationale in *Storey v Sparta Police Dep't*, 667 F Supp 1164 (MD Tenn, 1987), is misplaced, because the complaint does not allege a vacant position, let alone a vacant position that Ferris State was not filling because an applicant might be "white," "Caucasian," or "male." With the exception of the 1990 position that we have already addressed, the only other adverse employment action plaintiff identified is that Ferris State refused to create a position for him at some unspecified time. As set forth in the first "disparate treatment" count, plaintiff alleged that "[d]efendants have engaged in a pattern and practice of discriminating against whites by . . . creating tenure track positions for non-whites (most recently in 1996) but refusing to create a tenure track anthropology position for Plaintiff because of his color." The other two disparate treatment counts contain this same allegation, with the exception that the alleged prohibited characteristics are identified as "gender" and "race."

⁵ When deciding a motion under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by the movant's proofs. *Maiden, supra* at 119. The "substance or content of the supporting proofs must be admissible in evidence." *Id.* "Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo." *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002).

⁶ We note that plaintiff does not allege that the 1990 position existed when he was rehired in 1995.

Because plaintiff does not specifically address the above allegation in his brief on appeal for purposes of arguing that he stated a discrimination claim, we need not address it. *Eldred, supra* at 150. In any event, plaintiff failed to allege facts in his first amended complaint to support his conclusion that Ferris States refused to create a tenure-track position for him because of a prohibited characteristic. *Kramer, supra*. Viewed in a light most favorable to plaintiff, the allegation about the creation of tenure-track positions in the "disparate treatment" count of the first amended complaint suggests that Ferris State created tenure-track positions in such a manner as to require the selection process to be limited to "non-whites," "females" and "racial minorities." Other allegations in the first amended complaint, including the alleged 1990 position being restricted to a "black female," the alleged effect of the affirmative action policy to "place a bounty on the hiring of minorities and women" for those having input into hiring decisions, and a "white male" being removed from a "short list" of potential hires because of his "color," are also supportive of this interpretation of the first amended complaint.

Nonetheless, a claim that a selection process for a created position was discriminatory is distinguishable from a claim that an employer's refusal to create a position for a particular individual, to the exclusion of all others, was discriminatory. When a claim is made that a new position should have been created, the appropriate consideration is whether the employer intended to create a position, but did not do so because an applicant was in a protected class. Williams v R H Donnelly, Inc, 199 F Supp 2d 172, 178-179 (SD NY, 2002); see also Barakat v Taco Bell, Inc, 970 F Supp 634, 638 (ND III, 1997).

The allegations in plaintiff's first amended complaint regarding Ferris State's alleged discriminatory employment practices in selecting candidates to fill other created positions do not give rise to any duty on the part of Ferris State to create a position for plaintiff, or otherwise support an inference of discriminatory conduct. Cf. *Cooper v St Cloud State Univ*, 226 F3d 964 (CA 8, 2000) (university charged with denying tenure to an employee in a discriminatory manner need not create a new position for the employee to avoid Title VII liability). The general allegations about Ferris State's employment practices and plaintiff's allegation about Ferris State's refusal to create a tenure-track position for him, without more, are insufficient to state a discrimination claim under the CRA.

In light of the foregoing, while we do not agree with the Judge Miel's reasoning that plaintiff was required to plead *specific evidentiary standards* to survive a motion for summary disposition under MCR 2.116(C)(8), we affirm the grant of summary disposition to Ferris State under MCR 2.116(C)(8) with regard to the first amended complaint in it is entirety because the correct result was reached. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

We also conclude that plaintiff has not established that Judge Miel abused his discretion by denying plaintiff's motion to file the "fourth" amended complaint for purposes of conforming the complaint to the *McDonnell Douglas* method for proving discrimination. MCR 2.116(I)(5); *Weymers, supra* at 654. Given plaintiff's cursory treatment of this issue in his brief on appeal, we could decline to address it. *Eldred, supra* at 150. However, giving due consideration to the arguments presented in plaintiff's reply brief, we find no basis for awarding relief. The proposed fourth amended complaint failed to state a discrimination claim. *Lane v KinderCare Learning Centers, Inc,* 231 Mich App 689, 697; 588 NW2d 715 (1998). We decline to consider whether plaintiff should have been permitted to pursue the added retaliation count, as set forth in the proposed fourth amended complaint, because this specific issue is not set forth in the statement

of the questions presented. See MCR 7.212(C)(5); *Kirkaldy v Rim*, 251 Mich App 570; 584; 651 NW2d 80 (2002), lv pending; *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

Having concluded that plaintiff failed to state a cognizant claim for discrimination, we need not address plaintiff's additional arguments based on MCR 2.116(C)(7) and (10). However, were we to assume that plaintiff sufficiently stated a claim for discrimination, we would uphold Judge Miel's grant of summary disposition under both MCR 2.116(C)(7) and (10) with respect to the allegations in the first amended complaint.

In this regard, we decline to address defendants' claim that alternative grounds for dismissal existed under MCR 2.116(C)(7), because this claim is given only cursory treatment in their brief on appeal. *Eldred, supra* at 150. Considering the argument presented by defendants, we do not find that defendants have identified any issue that necessarily must be reached, but which has not been briefed by plaintiff, in reviewing the successor judge's order of summary disposition under MCR 2.116(C)(7). See *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Although the successor judge orally announced that he was adopting the arguments presented in defendants' brief in support of their motion, his written order does not reflect that he adopted defendants' arguments based on MCL 600.6431 of the Court of Claims Act, or mootness. A court speaks through its orders. *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 54; 436 NW2d 70 (1989). At best, defendants have identified potential issues that might support alternative grounds for affirmance. See *Middlebrooks v Wayne Co,* 446 Mich 151, 166, n 41; 521 NW2d 774 (1994) ("an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by a lower court").

In any event, plaintiff has not shown any basis for disturbing Judge Miel's grant of summary disposition under MCR 2.116(C)(7) on the ground that plaintiff did not plead an illegal deprivation during the three-year period preceding the initiation of the lawsuit on December 13, 1996. As already indicated, summary disposition under MCR 2.116(C)(7) was proper with regard to the allegations in the first amended complaint concerning the 1990 position. Neither the allegations about Ferris State's employment practices nor its refusal to create a position for plaintiff were sufficient to plead an actionable event during the three-year period preceding December 13, 1996. MCL 600.5805(9); Sumner, supra at 536.

Furthermore, were we to treat the first amended complaint as sufficiently pleading an actionable event (i.e., an adverse employment action) during the three-year period preceding December 13, 1996, we would uphold the grant of summary disposition in favor of defendants under MCR 2.116(C)(10) for failure to establish factual support for the occurrence of an adverse employment action against plaintiff based on a prohibited characteristic during the relevant three-year period.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The affidavits, pleadings, depositions, admissions and other documentary evidence are considered in a light most favorable to the nonmoving party in determining if any material facts exist for trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the proffered, admissible evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a

matter of law. *Maiden, supra* at 120-121. A mere promise to offer evidence is insufficient. *Id.* at 121. "The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Id.* at 121. "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Associates Ltd Partnership v General Retirement System,* 192 Mich App 360, 364; 480 NW2d 275 (1991).

Summary disposition is generally premature, however, if discovery on a disputed issue is incomplete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The test is whether further discovery stands a fair chance of uncovering factual support for the adverse party's position. *Id.*; *Ireland v Edwards*, 230 Mich App 607, 623; 584 NW2d 632 (1998).

Addressing first plaintiff's claim that he submitted direct evidence of unlawful discrimination, we consider whether the evidence, "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). If there is evidence of an employer's mixed motives for an adverse employment action, where one motive is impermissible, a plaintiff may withstand a motion for summary disposition under MCL 2.116(C)(10) with regard to a CRA claim. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2000).

We find plaintiff's characterization of his direct evidence as "pattern and practice" evidence insufficient to establish a factual basis for his claim of an adverse employment action motivated by discriminatory animus. A party may not leave it to this Court to discover the factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990); see also *Eldred*, *supra* at 150. Further, plaintiff's legal position is without merit because the cases applying the clear and convincing standard advocated by plaintiff involve federal actions brought by the Equal Employment Opportunity Commission (EEOC) or a class of private plaintiffs. See *EEOC v Joe's Stone Crab*, *Inc*, 220 F3d 1263, 1286 (CA 11, 2000). The federal standard for EEOC and class actions was not adopted in *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986), or applied to individual plaintiffs. Rather, our Supreme Court applied the generally recognized rule that the *McDonnell Douglas* method of proof may be tailored to fit the factual situation in a case. See also *Hazle*, *supra* at 463 n 6.

We note that plaintiff's reply brief identifies with greater specificity the specific items of proof that he alleges constitute direct evidence of unlawful discrimination. However, plaintiff has not identified admissible evidence giving rise to a reasonable inference of an adverse employment action against him motivated by discriminatory animus. Plaintiff has not established factual support for a vacancy to which the "hiring moratorium" rationale in *Storey*, *supra*, would apply. The only adverse employment action reflected in the proofs submitted to the successor judge with regard to defendants' motion under MCR 2.116(C)(10) concerned defendants' alleged refusal to create a tenure-track anthropology position for plaintiff in connection with a research project and applied anthropology degree program proposed by Thorp and another Ferris State employee, Lawrence Hanson, in 1995.

Nevertheless, plaintiff offered no evidence to rebut defendants' evidence that Thorp, while having input into the decision, did not have the authority to create a position. Further, the undisputed facts showed that Thorp took action to find a way to hire plaintiff and, in fact, hired him in 1995, albeit for a part-time temporary position rather than the tenure-track position that plaintiff alleges should have been created for him.

Where, as in this case, a plaintiff attempts to impute intentional discrimination to an entity (Ferris State) based on the actions of it agents, it would be unreasonable to impute that intent from disconnected facts. See generally *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 366-369; 508 NW2d 464 (1993) (Brickley, J.). Further, a litany of complaints about workplace decisions, which are not connected to the challenged adverse employment action, do not provide relevant evidence of the requisite discriminatory intent. See *Gorence v Eagle Food Ctrs, Inc*, 242 F3d 759, 762-763 (CA 7, 2001). Similarly, while evidence that an agent made a statement of discriminatory animus may provide direct evidence of intentional discrimination, *DeBrow, supra* at 538, isolated remarks, unrelated to the challenged employment action, do not. See *Cone v Longmont United Hosp Ass'n*, 14 F3d 526, 531 (CA 10, 1994); *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292-300; 624 NW2d 212 (2001).

Giving due consideration to plaintiff's claim in his reply brief, we conclude that plaintiff has not demonstrated direct evidence that Ferris State's refusal (through its agents) to create a position for him was motivated by a prohibited characteristic under the CRA. In particular, the evidence that Thorp made a statement that it would be easier to hire plaintiff if he was a minority, evaluated in a light most favorable to plaintiff, does not suggest the requisite discriminatory animus because the evidence indicated that plaintiff was, in fact, hired.

Further, we conclude that plaintiff failed to show a genuine issue of material fact under the *McDonnell Douglas* method of proof relative to whether Ferris State's refusal to create a tenure-track position for plaintiff was motivated by discriminatory animus. Assuming for purposes of our review that a genuine issue of material fact existed regarding whether Ferris State (through its agents) considered plaintiff to be an "American Indian" minority for purposes of its affirmative action policy, and giving due consideration to a court's ability to tailor the *McDonnell Douglas* approach to the factual situation here, we hold that plaintiff failed to establish a prima facie case of discrimination such that the burden shifted to Ferris State to articulate a legitimate, nondiscriminatory reason for its action. *Hazle, supra* at 463. A prima facie case can raise an inference of discrimination where one can presume that acts, if otherwise unexplained, are more likely than not based on a consideration of impermissible factors. *Id.* at 463.

Without evidence of an existing anthropology position that Ferris State, through its agents, was attempting to fill in 1995, when plaintiff sought to be rehired, plaintiff was left with the task of showing that Ferris State's failure to respond to his proposal by creating the position that he sought, to the exclusion of others, gave rise to an inference of unlawful discrimination. Because the proofs did not establish a prima facie case under the *McDonnell Douglas* method of

proof relative to this factual situation, the successor judge correctly concluded that summary disposition under MCR 2.116(C)(10) was proper.⁷

Lastly, we reject plaintiff's claim that summary disposition was premature because discovery was incomplete. The record does not support plaintiff's position that he was denied discovery. Rather, the record reflects that Judge Root stayed formal discovery approximately five months after plaintiff filed his original complaint, with the exception of discovery necessary for a determination of defendants' motion for summary disposition, provided that such discovery was approved in advance by stipulation or court order. Later, in July 1997, Judge Root denied plaintiff's motion to compel discovery after finding that the motion was overly broad. Because plaintiff has not briefed these discovery rulings, we do not address them. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Limiting our review to whether discovery stood a fair chance of uncovering factual support for the claims alleged in the first amended complaint, plaintiff has failed to show that summary disposition was premature. *Village of Dimondale, supra* at 566. Because the added retaliation claim in the fourth amended complaint is beyond the scope of plaintiff's statement of the questions presented, we decline to consider plaintiff's claim that he should have been afforded discovery relative to that count. MCR 7.212(C)(5); *Kirkaldy, supra*; *Meagher v McNeely & Lincoln, Inc, supra* at 156.

In sum, we conclude that Judge Miel reached the correct result in granting Ferris State summary disposition under MCR 2.116(C)(8). We also conclude that summary disposition was proper under MCR 2.116(C)(7) and (10). Although plaintiff has insufficiently briefed his claims relative to defendants Thorp and Hammersmith, our holding would apply equally to any discrimination claims asserted against them, individually, as a result of their respective decisionmaking roles in the alleged adverse employment actions.

III. Sanctions

Plaintiff also challenges the judgment that awarded defendants sanctions of \$181,003, against plaintiff, his attorneys James Fett and Marla Linderman, and the law firm of Fett & Linderman, P.C., jointly and severally. Though only plaintiff is identified as the appellant in the

⁷ Because our resolution of this issue is not dependent on the added element for a prima facie case adopted in Allen v Comprehensive Health Services, 222 Mich App 426; 564 NW2d 914 (1997) (in a "reverse" discrimination case, background circumstances may support a suspicion that the defendant is the unusual employer who discriminates against the majority), we need not address this element. Venable v General Motors Corp (On Remand), 253 Mich App 473; 656 NW2d 188 (2002), ly pending. We further note that, while the burden of articulating a legitimate, nondiscriminatory reason for its employment decision did not shift to Ferris State (or its agents), defendants offered proof through the June 4, 1997, affidavit of Hammersmith that, "[a]s a consequence of the fiscal constraints under which the University has been operating in recent years, no new tenure track positions have been created in the College of Arts and Sciences during the three years immediately preceding the commencement of this litigation (i.e., at least since December 13, 1993)." Hence, even if a prima facie case was established, the presumption dropped away, leaving plaintiff with the task of showing that the evidence, construed in his favor, would be sufficient for a reasonable trier of fact to conclude that discrimination was a motivating factor in the adverse action. Hazle, supra at 465. Plaintiff did not meet this burden of proof.

caption for this appeal, given the notice afforded in plaintiff's docketing statement and plaintiff's appeal brief regarding plaintiff's request for a refund of counsel's payment of the sanctions to defendants, we will treat the attorneys and law firm as appellants for purposes of our review. MCR 7.216(A)(2). Further, while we agree with defendants that plaintiff's appeal brief violates the double-spacing rule in MCR 7.212(B), we are not persuaded that the violation should be sanctioned by striking the appeal brief or the single-spaced entries. MCR 7.216(C)(1)(b).

However, we do find that plaintiff's argument concerning the signature requirements of MCR 2.114(D) is not properly before us because that issue is not set forth in the statement of the questions presented. *Kirkaldy, supra; Meagher v McNeely & Lincoln, Inc, supra* at 156. Further, we agree with defendants that plaintiff has failed to brief the inherent authority doctrine cited by Judge Miel as a basis for sanctions.

Nevertheless, the instant appeal may be decided on the basis of plaintiff's failure to establish that Judge Miel clearly erred in finding that plaintiff's reverse discrimination action was frivolous, as set forth in the statement of plaintiff's first two issues on appeal. MCL 600.2591 authorized the successor judge to impose sanctions as a result of the whole action. *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). Under MCL 600.2591(1), costs and fees are assessed against the "nonprevailing party and their attorney" for filing a frivolous action. MCL 600.2591(3)(a) defines "frivolous" as encompassing at least one of the following conditions:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
 - (iii) The party's legal position was devoid of arguable legal merit.

Though only one condition is required, we are not left with a definite and firm conviction that Judge Miel clearly erred in finding that all three conditions were established. *Kitchen v Kitchen,* 465 Mich 654, 661; 641 NW2d 245 (2002); *Evans & Luptak, PLC v Lizza,* 251 Mich App 187, 203; 650 NW2d 364 (2002).

The evidence that plaintiff had threatened to go on a "wrecking operation" before filing the action, examined in the context of the various activities undertaken by plaintiff or his attorneys in the instant case and several other forums, provide a reasonable basis for Judge Miel to find that MCL 600.2591(3)(a)(i) was established. Further, giving due regard to the fact that sanctions require an evaluation of a claim at the time a lawsuit is filed, we are not left with a definite and firm conviction that Judge Miel clearly erred in finding that MCL 600.2591(3)(a)(ii) and (iii) were each established. *Kitchen, supra*; see also *In re Costs & Attorney Fees*, 250 Mich App 89; 645 NW2d 697 (2002), and *In re Attorney Fees & Costs*, 233 Mich App 694, 702; 593 NW2d 589 (1999).

Because Judge Miel's findings justified sanctions with regard to the whole action under MCL 600.2591, we find it unnecessary to address his findings with regard to MCR 2.114(D), or his consideration of the inherent authority doctrine.

Turning to plaintiff's claim that Judge Miel abused his discretion in determining the amount of sanctions, we find no basis for disturbing Judge Miel's decision. Plaintiff has failed to show that the amount awarded by Judge Miel was unreasonable. *In re Costs & Attorney Fees, supra* at 104; *Head v Phillips Camper Sales & Rental, Inc,* 234 Mich App 94, 114; 593 NW2d 595 (1999). See also *Howard v Canteen Corp,* 192 Mich App 427, 437; 481 NW2d 718 (1991), overruled on other grounds in *Rafferty v Markovitz,* 461 Mich 265; 602 NW2d 367 (1999). The judge was not bound to accept the deposition testimony of plaintiff's proffered expert in determining the reasonableness of the hours claimed.

Affirmed.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens

⁸ Plaintiff has failed to demonstrate that Judge Miel assessed costs or fees outside of his jurisdiction. *Lopez-Flores v Hamburg Twp*, 185 Mich App 49, 53; 460 NW2d 268 (1990). The costs incurred were directly related to motions, briefs, and hearings in the circuit court case and a joint proceeding with another, related action. Moreover, plaintiff cites no record facts to support his arguments and we need not address the issue further. See *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

⁹ Because plaintiff has not shown grounds for remand, it is unnecessary to address plaintiff's claim that the case should be assigned to a different judge on remand.